160 U.S. 247, 256 (1895). The Court implicitly anticipates that the appellate court will take up these issues.

On remand, the circuit court must determine whether any issues outside the grant of certiorari require resolution, and propose means of bringing those issues to a close. "Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." *Glover*, 531 U.S. at 205.

B. The Court of Appeals followed established procedure in this case.

Following remand of *Scheidler II* from the Supreme Court, the Court of Appeals scrutinized the Supreme Court's grant of certiorari, found one outstanding issue, and concluded that, "[g]iven the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari . . . we will not presume that in this case it went beyond the scope of its grant of certiorari." *National Organization for Women*, 396 F.3d at 810. The Court of Appeals recognized that "[t]he district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case," *id.* at 812, and remanded to the district court for the resolution of the outstanding issue.

1. *The Court of Appeals correctly identified the outstanding issue.*

The Supreme Court granted certiorari in *Scheidler II* to answer "whether petitioners committed extortion within the meaning of the Hobbs Act" and

"whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to . . . [RICO]." 537 U.S. at 397. Following this Court's determination that Petitioners had not committed extortion within the meaning of the Hobbs Act, none of the 117 extortion-based acts remained to support the injunction. Having disposed of all predicate acts encompassed by the grant of certiorari, the Court was not obliged to address its second question. *Id.* at 411.

The Supreme Court's opinion in *Scheidler II* made no mention of the four predicate acts not based on extortion. The grounds that the Court invoked for invalidating these extortion-based acts do not necessarily apply to the physical violence acts. The Court of Appeals declined to interpret the Court's silence as holding those four acts insufficient to support the district court's injunction. Such a conclusion on the part of the Court of Appeals would have "require[d] that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion." *National Organization for Women*, 396 F.3d at 811.

The Court of Appeals properly articulated the remaining issue in the case as whether the four outstanding predicate acts alone could support the district court's injunction and, if so, whether the Hobbs Act outlaws "physical violence" apart from extortion and robbery. *Id.*

2. *The Court of Appeals' remand to the district court did not violate the Supreme Court's mandate to vacate the original injunction.*

The Court of Appeals' identification of a remaining issue warranting trial court consideration did not violate the Supreme Court's mandate to vacate

the original injunction. The Court of Appeals fully complied with the Supreme Court mandate by instructing the district court to dissolve the nationwide injunction and consider whether *"some form* of injunctive relief would be justified based on the four remaining predicate acts found by the jury." *National Organization for Women,* 396 F.3d at 812 (emphasis added).

C. The approach advanced by Petitioners would waste scarce judicial resources and obscure important issues in cases before this Court.

Petitioners' argument that the Court of Appeals erred when it remanded the case to the trial court to consider unresolved issues strikes at the heart of well-entrenched judicial procedures. Petitioners assert that because this Court did not explicitly direct the Court of Appeals to consider the remaining four acts of physical violence, this Court implicitly included them in its disposal of the extortion-based acts. This argument gets it exactly backwards. As the Court of Appeals understood:

> [W]e will not presume that in this case [the Supreme Court] went beyond the scope of its grant of certiorari . . . to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

National Organization for Women, 396 F.3d at 810-11.

Petitioners' vision of how this Court should function would yield an unmanageable appellate process. First, respondents would have to raise on appeal all arguments raised before the trial court to preserve issues for possible remand. If they did not do so, and if the Court's remand did not explicitly state

that specific issues remained open, then under Petitioners' theory further consideration of all issues would be automatically terminated.

In *Yee*, the Court recognized that forcing respondents to raise every possible alternative ground to support their position would impose an unsupportable burden:

> [T]he respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

503 U.S. at 536.

Moreover, the briefing and argument spent on alternative grounds would muddle the Court's inquiry and deflect attention from the questions presented. Decades of practice have endorsed this Court's limited method of review, and the courts of appeals' resolution of open issues, as the most efficient allocation of judicial workload. As this Court noted in *Yee*:

> Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important,

> thus enabling us to make efficient use of our resources.

Id. at 536.

By encouraging proliferation of the issues raised before the Court, Petitioners' approach would turn Supreme Court review into something similar to that conducted by a trial court, and in sharp contrast to the carefully focused review the Court undertakes now. This Court has historically used its scarce resources to resolve the most important questions of law, and has found the courts of appeals fully capable of addressing remaining issues. It is for these reasons that when respondents raise alternative grounds, the Court generally refuses to consider them. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

Proliferating issues would simply supply alternative bases for the Court's holdings, which then would have to be weeded out by the courts below. Although it is unfortunate that final resolution may be delayed once again, that is no reason to depart from established practice reflecting the wisdom of avoiding overly expansive appellate review.

The second unwelcome change the Petitioners' argument would induce is a drastic increase in motions for clarification to this Court. Uncertain whether the Court had implicitly disposed of trial court holdings in its rulings, parties would repeatedly return to the Court seeking clarification of which issues remained open on remand. The increase in motions for clarification would cost the Court and the litigants much unnecessary time and expense. The Court generally rules only on questions presented partly to avoid this inefficiency, and to minimize the

confusion to the parties that Petitioners' theory would provoke.

Although claiming simply to interpret this Court's mandate in *Scheidler II*, accepting Petitioners' argument would turn traditional judicial procedure on its head. This Court has made clear that ruling narrowly on questions presented, with resolution of outstanding issues left to the courts of appeals, is the most orderly and efficient distribution of judicial business. The Court of Appeals complied with this method when it properly remanded the case for the trial court to consider the four acts of physical violence.

CONCLUSION

For the foregoing reasons, Amici encourage the Court to rule in a manner that will effectuate the Court of Appeals' remand of this case to the District Court and to decline to rule on the second and third questions presented in this appeal.

Respectfully submitted,

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Nos. 04-1244, 04-1352

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURRAY, AND THE PRO-LIFE ACTION NETWORK, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NARAL PRO-CHOICE AMERICA, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICANS FOR DEMOCRATIC ACTION, INC., BLACK WOMEN'S HEALTH IMPERATIVE, CENTER FOR REPRODUCTIVE RIGHTS, CENTER FOR WOMEN POLICY STUDIES, HADASSAH, WZOA, INC., LEGAL MOMENTUM, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL COUNCIL OF JEWISH WOMEN, INC., NATIONAL HEALTH LAW PROGRAM, NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, WOMEN'S LAW PROJECT AND WOODHULL FREEDOM FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

NARAL Pro-Choice America (and its co-*amici)* are organizations committed to promoting civil rights. All share a strong interest in protecting the guarantees of the First Amendment of the United States Constitution and the right to peaceful, nonviolent protest. Indeed, most civil rights were secured through exercise of these First Amendment rights to advance and protect the freedoms to which their organizations are committed. At the same time, all the *amici* want to ensure that forcible, threatening and violent conduct is not confused with constitutionally-protected peaceful protest, lest the misdeeds of petitioners and others like them taint and ultimately put an end to *amici*'s and others' efforts to effect social change through legitimate, constitutionally-protected means.[1] (Descriptions of each of the *amici* are provided in the Appendix hereto.)

STATEMENT

Amici note the following facts particularly relevant to the legal discussion in this brief.

This case was brought on behalf of full-service health clinics and their patients whose interstate business operations repeatedly have been disrupted by petitioners' nationwide campaign of violence and terror. The evidence presented to the courts below demonstrated beyond doubt that petitioners unlawfully conspired to force the closing of clinics that perform abortions and that they did so through a pattern of illegal

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[1] All parties in this matter have consented to the filing of this *amici curiae* brief, as evidenced by the letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *amici* and their counsel has made any monetary contribution to the preparation of this brief.

racketeering activity that included acts and threats of violence in violation of the Hobbs Act. Respondents have suffered substantial injury as a result of petitioners' unlawful conduct, which unquestionably has affected respondents' ability to provide medical care to their patients throughout the country, and which, as both lower courts have found, is fully redressable only through injunctive relief. In addition, by finding petitioners liable for four "acts or threats of physical violence" under the Hobbs Act, the jury necessarily found, as both the district court and the Seventh Circuit expressly have held, that petitioners' conduct is not protected speech under the First Amendment. These First Amendment rulings are not before this Court.[2]

The evidence presented at trial demonstrated that petitioners operated and managed their RICO enterprise, the Pro-Life Action Network ("PLAN"), through force, threats and violence, to prevent respondents from exercising their rights to access constitutionally-protected medical procedures. Naming themselves the "pro-life Mafia," petitioners participated in a long-standing pattern of engaging in, authorizing, and/or ratifying wrongful acts and threats of physical violence as a means to put an end to safe, legal abortion throughout the country. Their wrongful conduct included:

- In Los Angeles, California, PLAN protesters physically assaulted a patient who was seeking medical care at a health clinic as a follow-up to her

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[2] Prior to trial, in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"), this Court reversed the initial dismissal of the complaint in this case, finding that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), does not have an "economic motive" requirement. Also prior to trial, but after the decision in *Scheidler I*, this Court denied petitioners' request for certiorari on, *inter alia*, First Amendment issues. *Scheidler* v. *Delaware Women's Health Org., Inc.*, 513 U.S. 1058 (1994) (mem.).

ovarian surgery. She testified: "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people and they were grabbing their arms and grabbing at me. . . . Then I felt myself going down, and I got scared, real scared." One protester hit her over the head with a "big" picket sign. The attack forced open this patient's surgical incision, causing her to bleed from the abdomen, and she had to be rushed to the hospital. (Appendix to Petition for a Writ of Certiorari of Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc. ("Sch. App.") 143a-144a.)

- In Chico, California, hundreds of PLAN members physically smashed a clinic administrator and two clinic escorts up against a clinic's entrance doors. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout: "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." The glass entrance to the clinic was damaged, and the clinic administrator received bruises on her legs and arms. (*Id.* at 143a.)

- In Pensacola, Delaware, while petitioner Joseph Scheidler stood outside with a bullhorn, a number of PLAN members burst into a reproductive health clinic and engaged in several acts of violence. They pushed the clinic administrator down the stairs, causing her severe disk damage; as a result, the administrator had to wear a neck brace and go to physical therapy for several months. In addition, one of the invaders slammed a National Organization for Women ("NOW") escort up against

the wall, causing serious injuries. The PLAN members also destroyed the clinic's medical equipment. (Trial Transcript ("Tr.") 1469-72, 4022.)

- In Washington, D.C., busloads of PLAN members rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "[S]everal of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt.'" (Sch. App. 143a.)

- In Milwaukee, Wisconsin, PLAN members repeatedly banged on a patient's car as she entered a health clinic parking lot and grabbed at her arms and legs as she attempted to enter the clinic. (*Id.*)

Numerous witnesses testified to the impact that this violence had upon them. A clinic volunteer recounted, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us. . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." A patient testified, "I was hysterical. I was afraid. I thought they were going to kill me." (Sch. App. 144a-145a.) A clinic administrator explained, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified." (*Id.* at 143a-144a.)

At the close of trial, after the presentation of this evidence and much more, the district court instructed the jury on the relevant legal issues. Regarding the First Amendment, the district court made clear to the jury that "the right to engage in peaceful protest" is not "an issue in this lawsuit," and that "[t]he parties agree that peaceful picketing, leafletting, and

participating in the legislative process are activities protected by the First Amendment." (Sch. App. 178a.) Then, in complete accordance with this Court's precedents, the district court specifically instructed the jury that while "[m]ere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing,"

> [t]hreats to patients, owners or operators of clinics, clinic staff including doctors, and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment. Destruction of property is not protected by the First Amendment.

(*Id.* at 187a-188a.) In addition, guided by this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), the district court emphasized that petitioners would not be liable through "guilt by association," instructing the jury that "[l]iability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence" and that "[i]n order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." (*Id.* at 185a.)

The jury returned a unanimous verdict, finding petitioners responsible for operating PLAN through a pattern of 121 RICO predicate acts, including 4 acts or threats of physical violence. (Sch. App. 190a-195a.) The district court then independently found that petitioners' crimes had continued unabated and that injunctive relief was both necessary and fully consistent with the First Amendment. As the district court noted, "[t]he injunction restrains specific behavior of

[petitioners] that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, trespassing, damaging property, and using violence or threats of violence. . . . The injunction still leaves open many avenues for [petitioners] to express their anti-abortion beliefs . . . such as peaceful picketing, public speeches, pamphleting, praying, or sidewalk counseling." (*Id.* at 169a (citations omitted).)

In affirming the jury verdict and injunction, the Seventh Circuit similarly held that there were no First Amendment problems in this case, noting that "the record is replete with evidence of instances in which [petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts." (Sch. App. 44a.) The court of appeals emphasized that "the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct." (*Id.*) Furthermore, the Seventh Circuit held that the district court's *Claiborne Hardware* instruction—the only First Amendment jury instruction challenged by petitioners on appeal—fully complied with the law. (*Id.* at 49a-51a.)

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), this Court reversed on the ground that petitioners had not committed extortion under the Hobbs Act. The *Scheidler II* Court limited its decision to the single question of extortion. As here (and as in *Scheidler I*), no First Amendment issues or jury instruction challenges were before the Court.[3] After receiving the *Scheidler II* mandate, the

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[3] Petitioners sought review on First Amendment issues in *Scheidler II*, *see* Petition for a Writ of Certiorari of Joseph Scheidler, et al., *Scheidler II*, 537 U.S. 393 (No. 01-1118), 2002 WL 32101166, at *i; Petition for Writ of Certiorari of Operation Rescue, *Scheidler II*, 537 U.S. 393 (No. 01-

Seventh Circuit remanded to the district court to determine one remaining question: whether the petitioners' four predicate acts involving acts or threats of physical violence are sufficient to support an injunction. It is this limited ruling by the Seventh Circuit that is now on review.

In particular, this Court has granted certiorari review on three questions: (i) whether the court of appeals violated this Court's mandate in *Scheidler II*; (ii) whether the Hobbs Act prohibits acts and threats of physical violence that are not connected to robbery or extortion; and (iii) whether injunctive relief is available in a private civil action under RICO. Although no First Amendment question is at issue before this Court, petitioners and their *amici* nevertheless suggest that an injunction prohibiting them from repeating concededly illegal acts—threats of violence and violence—somehow would transgress the First Amendment. Given this suggestion, *amici* explain below that First Amendment freedoms are in no way hampered by this case. For the reasons discussed below, and those in respondents' brief, the Court should affirm.

SUMMARY OF ARGUMENT

This case is about the scope of the Hobbs Act and the remedies available under RICO. It is about petitioners' criminal acts and threats of violence. This case is neither about abortion nor is it about peaceful social protest protected by the First Amendment.

1119), 2002 WL 32101172, at *i, but the Court limited its grant of certiorari to (i) the meaning of "extortion" under the Hobbs Act and (ii) whether private injunction relief is available under RICO, *see Scheidler* v. *National Org. for Women, Inc.*, 535 U.S. 1016 (2002) (mem.); *Scheidler II*, 537 U.S. at 397. The Court did not reach the RICO injunction question. *See id.*

As this Court has long recognized, "[t]he First Amendment does not protect violence." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *Claiborne Hardware*, 458 U.S. at 916) (internal quotation marks omitted) (noting that physical assaults are not protected by the First Amendment). This Court also has made clear that "[t]hreats of violence are outside the First Amendment." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (internal quotation marks omitted). Indeed, as the Seventh Circuit noted below, "[v]iolence in any form is the antithesis of reasoned discussion." (Sch. App. 55a.) Petitioners, found by the jury to have engaged in unlawful violent conduct—conduct that, in *Scheidler II*, both this Court and petitioners acknowledged was "criminal," *Scheidler II*, 537 U.S. at 404 & n.9—cannot cloak themselves in the mantle of nonviolent protest and expression protected by the First Amendment. Thus, holding petitioners accountable for their violent actions will not jeopardize this nation's long tradition of peaceful political protest. It will simply (and properly) direct those with passionate views "away from the use of threats and violence and back to 'all the peaceful means for gaining access to the mind.'" (Sch. App. 55a.)

The Seventh Circuit properly has made clear that the only injunction still available in this case is one tailored to redress the specific types of clearly illegal conduct that the jury found petitioners had engaged in the past. The injunction sought by respondents is necessary to save lives. Even as limited by the Seventh Circuit, an injunction remains essential to ensure the safety of medical professionals from petitioners' continuing nationwide pattern of unlawful, unprotected acts and threats of violence.

Accordingly, this Court should affirm the Seventh Circuit's decision and permit the district court to consider in the first instance "[t]he only remaining question" in this litigation: whether petitioners' acts and threats of physical violence are sufficient to support an injunction.